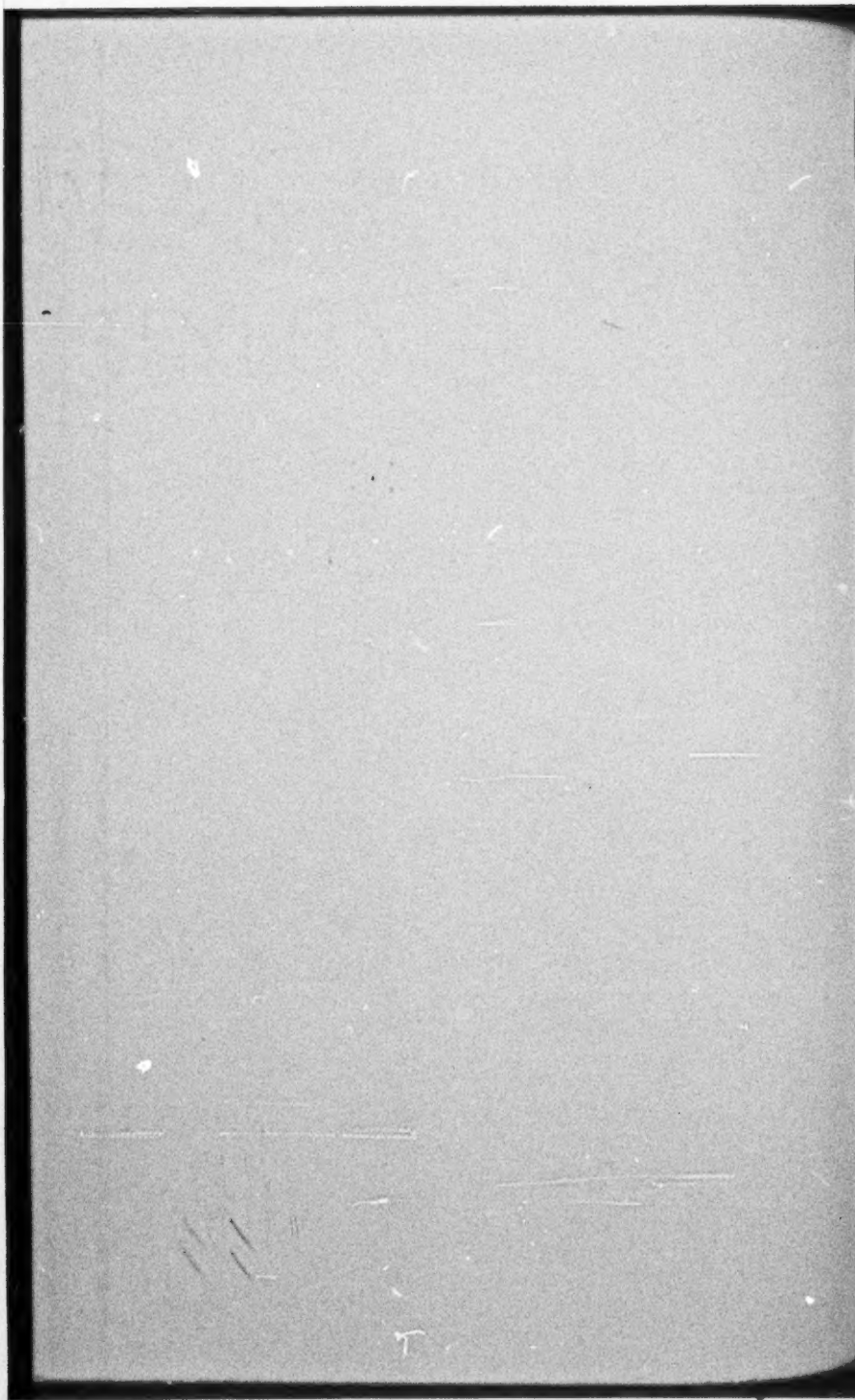

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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**No._____**

---

ELSALTO REAL ESTATE, INC.,
a Florida corporation,

Petitioner,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation created and organized under the laws of the State of Florida,

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA,

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Elsalto Real Estate, Inc., a Florida corporation, respectfully petitions for a writ of certiorari to the Supreme Court of the State of Florida to review an opinion of that court entered on January 27, 1953 (r. 38), and the order of that court dated March 26, 1953 (r. 48) denying the petition of Elsalto Real Estate, Inc. for a rehearing

with respect to said opinion of that court entered on January 27, 1953, and the mandate of that court thereon entered on March 26, 1953 (r. 48), which quashed the following orders of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, In Chancery, to wit:

> Order dated July 28, 1952, (r. 25) denying the motion of The City of Miami Beach to dismiss the bill of complaint of Elsalto Real Estate, Inc. as amended, in a suit in equity praying for a decree declaring that a zoning ordinance of the city, as applied to land of plaintiff, was unconstitutional, etc. and requiring the city to rezone the land, and praying for an injunction against the prosecution by the city of the eminent domain proceeding next described; and
>
> An order dated July 25, 1952 (r. 24), staying a separate eminent domain proceeding of said city in said Circuit Court against said land of Elsalto Real Estate, Inc. until the equities of said rezoning etc. case were determined by said Circuit Court.

The opinion of the Supreme Court of the State of Florida is reported in 63 So. 2d 493 (advance sheet of April 9, 1953), and is also set forth at pages 37 through 41 of the transcript of record.

## I.

## STATEMENT OF THE MATTER INVOLVED

On June 2, 1952, Elsalto Real Estate, Inc. filed its verified bill of complaint (r. 3) in the Circuit Court of

the Eleventh Judicial Circuit of the State of Florida, In Chancery, and thereafter amended the same (r. 15 and 22), wherein, among other things it averred:

That Elsalto Real Estate, Inc. was, and had, since March 2, 1940 been, the owner of a described tract of improved ocean front land in the City of Miami Beach on which was situated a large and costly dwelling house containing about fourteen rooms and servants quarters (r. 3 and 4); that zoning ordinance No. 289 of said city adopted December 3, 1930, which restricted the use of Elsalto's land to R-AA estate district use and required a lot area of not less than 40,000 square feet for each family, was (by reason of extensive changes in the character of the neighborhood, increased motor vehicle traffic and other noises, very recent rezoning of seven similar lots, containing about 8.13 acres, and located in the same narrow tier of ocean front lots about 750 feet from Elsalto's land, from R-AA estate district use to RE Multiple Family District use by virtue of an order of said Circuit Court which had been affirmed by the Supreme Court of Florida, described in the complaint (r. 6-8), unreasonable, arbitrary, oppressive, confiscatory, invalid and violated the following portions of Sec. 1 of Art. XIV of the Constitution of the United States, to wit, "nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law", and also violated Sec. 12 of Declaration of Rights, and Sec. 29 of Art. XVI, of the Constitution of the State of Florida (r. 9, 10 and 11); that, by reason of said changes in the character of the neighborhood, increased traffic, recent rezoning in the immediate neighborhood, etc. (r. 6-8) Elsalto's land was unsuitable and not in demand for said

R-AA estate district use, but was in great demand as a location for the site of apartment houses and hotels (r. 8 and 9); that the market value of said land as zoned for R-AA estate district use was two or three times less than the market value thereof would be if said land were zoned for RE multiple family district use so as to permit the erection thereon of apartment houses and hotels (r. 9), and that if existing zoning restrictions on said land are not removed Elsalto will suffer a loss or damage in excess of $250,000.00 (r. 9 and 10); that, by reason of said changes in the character of the immediate neighborhood, increased traffic, recent rezoning in the immediate neighborhood, the present zoning of said land for R-AA estate district use is not predicated on or related to public safety, public health, public welfare or public morals (r. 9), and the continuance of said land in its present R-AA estate district zoning use and restriction is not of any aid or benefit to any general plan for the development of the city of Miami Beach (r. 9); that the rezoning of plaintiff's property so as to include it in said "RE Multiple Family District" would not affect the public safety, health, morals or general welfare of the city of Miami Beach (r. 9 and 10); that, pursuant to a mandate from the Supreme Court of Florida, the Firestone estate property, consisting of seven contiguous lots containing about 8.13 acres (which Firestone lots are in the same narrow tier of ocean front lots in which Elsalto's land is located, and which Firestone estate lots are 750 feet south of Elsalto's land) (r. 5 and 7) had very recently been rezoned by the city of Miami Beach from said R-AA estate district use to said RE multiple family district use, so as to permit the erection thereon of apartment houses and hotels (r. 7); that there was then pending in said circuit court a suit commenced on March 21, 1952, by Sam Kay

and Samuel T. Haas against the city of Miami Beach wherein they were seeking to have their five contiguous ocean front lots (which Kay and Haas lots are in the same tier of ocean front lots in which Elsalto's land is located, and which Kay and Haas lots are bounded on the south by said Firestone estate lots, and which Kay and Haas lots are 250 feet south of Elsalto's land) rezoned by the city of Miami Beach from said R-AA estate district use to said RE multiple family district use (r. 10 and 11); that there was then pending in said circuit court a suit by H. Gertrude Hogan against the City of Miami Beach wherein she was seeking to have her 1½ ocean front lots (which Hogan lots are in the same narrow tier of ocean front lots in which Elsalto's land is located, and which Hogan lots are bounded on the south by said Kay and Haas lots, and which Hogan lots are 150 feet south of Elsalto's land and have a dwelling house thereon) rezoned by the city of Miami Beach from said R-AA estate district use to RE multiple family district use (r. 10 and 5); that there was then pending in said circuit court a statutory condemnation proceeding recently instituted by the city of Miami Beach against Elsalto Real Estate, Inc., H. Gertrude Hogan and another person, wherein said City contended that it was seeking to acquire the fee simple title to the aforesaid ocean front land owned by Elsalto Real Estate, Inc., the aforesaid ocean front land owned by said Hogan, and the 150 feet of unimproved ocean front land lying between said lots of Elsalto and said lots of Hogan, for alleged "public park purposes" (r. 12); that said City is not attempting to so acquire Elsalto's land for "public park purposes" but the real purpose of that proceeding is to acquire Elsalto's land for the following purposes, to wit, "housing temporarily, and entertaining from time to time, visiting dignitaries, public officials and

important people from other cities in the United States of America and from foreign states and governments, and to assist (said City) in contesting, and attempting to defeat, legal and other actions, of persons owning land in Miami Beach, against said City, to procure the rezoning of their ocean front tracts of land" (r. 12 and 13); that said City, by said condemnation proceeding, was seeking to acquire Elsalto's land "for the purpose of creating a 'buffer zone' to deter and prevent attempts to so rezone said ocean front property" in said tier of lots which extended approximately 1½ miles north of said Firestone estate property (r. 13); that on July 23, 1952, on formal petition of Elsalto Real Estate, Inc., the City Council of the city of Miami Beach, "by unanimous vote in their formal public meeting on said date, did summarily adopt a resolution denying" Elsalto's aforesaid petition "to change the zoning on . . . (Elsalto's) property from 'RAA Estate District' to 'RE Multiple-Family District' . . . in order that said property may be used for its highest, best and most appropriate use, namely for multiple-family apartments and hotels" (r. 22 and 23); and that Elsalto Real Estate, Inc. has "exhausted all administrative remedies which can possibly be considered as available to it . . ." (r. 23); **and, in said bill of complaint as amended, Elsalto Real Estate, Inc. prayed for the following relief:** That said court establish and declare that said ordinance No. 289 so restricting the use of Elsalto's aforesaid land to said R-AA estate district use and requiring a lot area of 40,000 square feet for each family is unreasonable, arbitrary, oppressive, confiscatory, unconstitutional and invalid, and permanently enjoin and restrain the city of Miami Beach from enforcing said portions of said ordinance against Elsalto's land, and that the rezoning of Elsalto's land so as to place it in said RE multiple

family district use will not affect the public safety, public health, morals of the community or the general welfare of the city of Miami Beach; that said court will enjoin and restrain the city of Miami Beach from prohibiting or interfering with the use of Elsalto's land for any use permitted within said RE multiple family district; that said court "will enter its order temporarily enjoining the city of Miami Beach from further prosecuting said condemnation proceeding . . . as against and with respect to . . . Elsalto's aforesaid property until this (equity) case has been determined and the final decree entered herein"; that said court will permanently enjoin the city of Miami Beach from further prosecuting said condemnation proceeding as against Elsalto's land; and for general relief (r. 14 and 15).

The city of Miami Beach filed its motion to dismiss said bill of complaint as amended on the ground that it did not state a claim upon which relief can be granted (r. 23-24). The city of Miami Beach never filed any answer to Elsalto's aforesaid bill of complaint as amended.

Elsalto Real Estate, Inc.'s petition for an order temporarily staying or enjoining the further prosecution by the city of Miami Beach of its aforesaid condemnation proceeding, in so far as said condemnation proceeding affected Elsalto's land (which petition was in Elsalto's aforesaid verified bill of complaint as amended, (r. 15), came on for hearing and disposition by the Chancellor on July 24, 1952. No evidence was tendered by, or admitted on behalf of, the City of Miami Beach at that hearing (r. 26 thru 36). At that hearing Elsalto Real Estate, Inc.'s verified bill of complaint as amended was considered by the Chancellor, and also the following evidence was ad-

mitted on behalf of Elsalto Real Estate, Inc., to wit: Minutes of a meeting on April 4, 1952, of the City Council of the City of Miami Beach reciting, in effect, that said eminent domain proceeding was for the purpose of creating a buffer zone to prevent attempts by other property owners to have their lands to the north of Elsalto Real Estate, Inc.'s land rezoned, and not for public park uses (r. 27 and 28); and depositions of four councilmen of the City of Miami Beach to the effect that the acquisition of Elsalto Real Estate, Inc.'s land was to create such a buffer zone and not a public park (r. 26 thru 36).

On July 25, 1952, the trial court, on plaintiff's aforesaid verified bill of complaint as amended and on the evidence admitted on July 24, 1952, on behalf of Elsalto Real Estate, Inc. (r. 24), entered an order staying the "prosecution of any trial of and hearing in" said condemnation proceeding in that court, "in so far as said hearing and trials involve and affect Elsalto Real Estate, Inc." and its aforesaid land, "until after the final decision, determination and disposition of the issues and rights of the parties involved in" said suit in equity in that court (r. 24-25).

On July 28, 1952, the trial court also entered an order denying the City's aforesaid motion to dismiss Elsalto's bill of complaint as amended (r. 25-26).

On August 26, 1952, the City filed in the Supreme Court of Florida its petition for writ of certiorari, wherein it asked the Supreme Court of Florida to quash said order granting said stay of said condemnation proceeding, and said order denying the City's said motion to dismiss Elsalto Real Estate, Inc.'s bill of complaint as amended (r. 1-2).

On January 27, 1953, the Supreme Court of Florida entered its order and decree quashing said order of the trial court granting said stay of the condemnation suit and said order of the trial court denying the city's motion to dismiss Elsalto Real Estate, Inc.'s bill of complaint on authority of its opinion in the case of The City of Miami Beach v. H. Gertrude Hogan, which was filed on January 27, 1953 (r. 37).

That case of The City of Miami Beach v. H. Gertrude Hogan is a companion case with this case of Elsalto Real Estate, Inc.; the pleadings in each case being very similar, the issues in each case being the same, the motions and orders in the trial court being the same, and the hearings in the trial court and in the Supreme Court of Florida being had at the same time. Said Hogan case is also now before the Supreme Court of the United States on her petition for certiorari.

In these two companion cases the Supreme Court of Florida apparently was divided on the meaning of the "fairly debatable" rule in zoning cases. The majority of the Supreme Court of Florida, in an opinion written by Mr. Associate Justice Mathews and concurred in by Associate Justices Thomas, Sebring, Roberts and Drew, held, in effect, that in zoning cases the "fairly debatable" rule, as defined in the case of City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (which case adopted said quoted words from the case of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303), now means that the legislative intent should be sustained by the courts even though the facts as pleaded show that the zoning ordinance, as applied to the locus in quo, is arbitrary and unreasonable and has no substantial relation to

the public health, safety, morals or general public welfare. To state it in another way, the "fairly debatable rule" now means that if the bill of complaint shows that the general zoning ordinance was regularly adopted by the municipality, the courts of Florida cannot and should not inquire into whether the pleaded facts do establish that the general zoning ordinance, as applied to plaintiff's land, is arbitrary and unreasonable and has no substantial relation to the public health, safety, morals or general public welfare, and that plaintiff's constitutional rights have been violated, but that the courts of Florida should dismiss the bill of complaint and action on the ground that it sets forth no claim upon which relief can be granted (r. 37 thru 41). Mr. Chief Justice Hobson and Mr. Associate Justice Terrell dissented, but filed no dissenting opinion (r. 41).

On February 10, 1953 (r. 41), Elsalto Real Estate, Inc. filed its petition for rehearing in the Supreme Court of Florida wherein it prayed, in effect, that court to review and reverse its aforesaid opinion on the following grounds, **among others**, to wit:

a. Because the "fairly debatable" rule, as defined by the Supreme Court of the United States in said case of Euclid v. Ambler Realty Co., had been determined, in said opinion of the Supreme Court of Florida, to mean that, in zoning cases, the legislative intent should be sustained by the courts, and the complaint and action should be dismissed, even though the pleaded facts show that the regularly adopted zoning ordinance, as applied in certain particulars to the locus in quo, is arbitrary and unreasonable and has no substantial relation to the public health, safety, morals or general public welfare and amounts to

the taking of plaintiff's property rights without due process of law and contrary to Sec. 1 of Article XIV (amended) of the Constitution of the United States of America (r. 42 thru 45).

b. Because said bill of complaint as amended averred that those parts of said zoning ordinance that restricted the land of Elsalto Real Estate, Inc. to said R-AA Estate district use, by reason of fully described recent and numerous physical, economic and social changes in the immediate neighborhood, had no foundation in reason and were a mere arbitrary and irrational exercise of power having no substantial relation to the public health, morals, safety or general welfare, and therefore violated Section 1 of Article XIV (amended) of the Constitution of the United States. That, when the Supreme Court of Florida, in effect, sustained the city's motion to dismiss the bill of complaint as amended, said action was arbitrary and unreasonable and deprived Elsalto Real Estate, Inc. of its property without due process of law and contrary to the provisions of Section 1 of Article XIV (Amended) of the Constitution of the United States (r. 42, 43, 44, 45).

On March 26, 1953, the Supreme Court of Florida denied said petition for rehearing, without filing any opinion (r. 48).

## II.

## JURISDICTIONAL STATEMENTS

a. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (b) of the Judicial Code as amended; 28 U.S.C.A., Sec. 1257 (3).

b. The opinion or decree of the Supreme Court of Florida to be reviewed was entered on January 27, 1953 (r. 37-38). The petition for rehearing was filed on February 10, 1953 (r. 41) and denied on March 26, 1953 (r. 48). A mandate on said opinion was made and entered on March 26, 1953 (r. 48-49).

c. The Supreme Court of Florida is the court of last resort of the State of Florida. Its mandate dated March 26, 1953 (r. 48-49) is a final judgment or decree, within the meaning of 28 U.S.C.A., Sec. 1257 (3). See: North Carolina R. Co. v. Story, 268 U.S. 288, 45 S. Ct. 531, 69 L. Ed. 959; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822; Lykes Bros. Florida Co. v. King et al, 125 Fla. 101, 169 So. 595 (2); Dudemaine et al v. Shaw et al, 153 Fla. 16, 13 So. 2d. 444.

d. That said provisions of said ordinance restricting Elsalto Real Estate, Inc.'s land to said R-AA estate district use are arbitrary, unreasonable, confiscatory and contrary to the following provisions of Section 1 of Article XIV (amended), of the Constitution of the United States of America, to wit, "nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," and have no substantial relation to the public health, morals, safety or general welfare, were first raised in the original bill of complaint of Elsalto Real Estate, Inc. (r. 10, 11-12 and 8-9). Said violation of said federal constitutional rights was again raised in the petition for rehearing filed on February 10, 1953, in the Supreme Court of Florida (r. 43, 44, 46-48). The Supreme Court of Florida denied that petition for rehearing without any opinion (r. 48).

e. That the Supreme Court of Florida in its opinion entered in this case on January 27, 1953, misconstrued and misapplied the "fairly debatable" rule in a rezoning case, as said rule is defined in the case of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, was first raised in the petition for rehearing that was filed on February 10, 1953 in the Supreme Court of Florida (r. 44-45). The Supreme Court of Florida denied said petition for rehearing without any opinion (r. 48).

f. That that part of the decision of the Supreme Court of Florida dated January 27, 1953, to the effect that Elsalto Real Estate, Inc. sat idly by and took no action until after the institution of the condemnation proceeding against its land and then only for the purpose of compelling the city in the condemnation proceeding to pay the increased value brought about by rezoning, was arbitrary and capricious and amounted to the taking of Elsalto Real Estate, Inc.'s property right without due process of law, was first raised in the petition for rehearing that was filed on February 10, 1953 in the Supreme Court of Florida (r. 46 and 47). The Supreme Court of Florida denied said petition for rehearing without any opinion (r. 48).

## III.

## QUESTIONS PRESENTED

a. Whether in a suit in equity to enjoin a municipality from enforcing those provisions of its zoning ordinance whereby complainant's land was restricted to R-AA estate district use and required a lot area of not less than 40,000 square feet for each family, by reason of the fact that, on account of enumerated physical, economic and

social changes in the neighborhood where that land is situate occuring since the adoption of the ordinance, the provisions of the ordinance attacked are arbitrary and unreasonable and have no substantial relation to the public health, morals, safety or general welfare, and are no longer of any aid or benefit to any general plan for the development of the municipality, and prevent complainant from using said land for its best and most valuable use, to wit, RE multiple family district use, and consequently deprive complainant-landowner of its property without due process of law contrary to the provisions of Section 1 of Article XIV (Amended) of the Constitution of the United States, state chancery courts are required to follow the rule laid down by the Supreme Court of the United States for all courts that in such circumstances the courts are authorized and should inquire into the facts to determine the validity of the stated provisions of the zoning ordinance attacked. In the case under consideration, the Supreme Court of Florida held, in effect, that the rule means that the legislative intent so controls that the Florida courts should not take jurisdiction to hear such cases and determine if the facts will establish the invalidity of such provisions of the zoning ordinance; which construction is so arbitrary and oppressive that it results in the taking of complainant's property without due process of law contrary to Section 1 of Article XIV (Amended) of the Constitution of the United States.

## IV.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

### 1.

*The decision of the Supreme Court of Florida in*

*this case is in conflict with the decision of the Supreme Court of the United States in the case of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, and with federal court decisions adhering to the tests laid down in that case.*

In said Euclid v. Ambler Realty Co. case the Supreme Court of the United States held that where the constitutional validity of a general zoning ordinance depends upon the existence of facts, and if the question of what the facts establish is a fairly debatable one, the legislative judgment must be allowed to control, and that the court will not substitute its judgment for that of the legislative body. In the case under consideration, the Supreme Court of Florida has construed said "fairly debatable" rule to mean that, in an equity rezoning suit, even though the facts pleaded in a verified bill of complaint show that certain provisions of a municipal zoning ordinance, which require complainant's land to be used for R-AA estate district use and a lot area of not less than 40,000 square feet for each family, are arbitrary and unreasonable, and have no substantial relation to the public health, morals, safety or general welfare, and the continuance of said land in said R-AA estate district use and restriction is no longer of any aid or benefit to any general plan for the development of the municipality but will deprive complainant from using said land for its best and most valuable use, to wit, RE multiple family use and materially injure and damage complainant, the court should not take jurisdiction of the case to determine the truth of said pleaded facts and the results thereof on complainant's land, because that would amount to the court substituting its judgment for that of the legislative city council.

The Supreme Court of Florida by its construction of the decision of the Supreme Court of the United States in the Euclid v. Ambler Realty Co. case has raised an important question, in the application of the law respecting the right and duty of state courts to declare zoning ordinances to be unconstitutional and invalid, that should be decided by the Supreme Court of the United States.

2.

*The action of the Supreme Court of Florida was arbitrary and capricious and should be reviewed by the Supreme Court of the United States.*

The bill of complaint as amended was verified (r. 15, 16 and 23). The facts therein pleaded: Amply showed that those portions of the zoning law that required Elsalto Real Estate, Inc.'s land to be used for said R-AA estate district use and require a lot area of not less than 40,000 square feet for each family were arbitrary and unreasonable and bore no substantial relation to the public health, safety, morals or general welfare, and that the continuance of said land in said R-AA estate district use was not of any aid or benefit to any general plan for the development of the municipality and materially injured and damaged Elsalto Real Estate, Inc. (r. 8-10); and established that Elsalto Real Estate, Inc. had exhausted all required administrative remedies (r. 22-23). The trial court held that the bill of complaint as amended stated a case upon which relief might be granted, and overruled the city's motion to dismiss (r. 25-26). The Supreme Court of Florida overruled the trial court and dismissed the action (r. 48-49). In its opinion, the majority of the mem-

bers of the Supreme Court of Florida indicated that if the bill of complaint as amended set forth a cause of action upon which relief might be granted, and the lower court assumed jurisdiction and took testimony, that that alone would amount to the substitution of the judgment of the court for that of the lawmaker.

3.

*The decision of the Supreme Court of Florida that Elsalto Real Estate, Inc. sat idly by and took no action until after the institution of the condemnation proceeding against its land and then only for the purpose of compelling the city, in the condemnation proceeding, to pay the increased value brought about by rezoning, was arbitrary and capricious and should be reviewed by the Supreme Court of the United States.*

The decision of the Supreme Court of Florida that, in effect, Elsalto Real Estate, Inc. lost its right to have its land rezoned for its best and most valuable use so that it could without any question obtain its full or highest market value in the condemnation proceeding, because the city by quick action got its condemnation proceeding started first, and that consequently the trial court, in which both the rezoning suit and the condemnation proceeding were pending, had no right or power to stay the condemnation proceeding until the determination of the equities of the rezoning suit, amounted to the taking of Elsalto Real Estate, Inc.'s property without due process of law contrary to the provisions of Section 1 of Article XIV (Amended) of the Constitution of the United States.

Wherefore, petitioner prays that a writ of certiorari be issued, directed to the Supreme Court of Florida, to the end that this cause may be reviewed and determined by the Supreme Court of the United States; and that the decree of the Supreme Court of Florida be reversed by the Supreme Court of the United States; and for such other and further relief as the Supreme Court of the United States may deem meet and proper.

Respectfully submitted,

CARL T. HOFFMAN
As Solicitor for Elsalto Real Estate, Inc., a Florida Corporation.

Address:
1115 duPont Building,
Miami, Florida

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

---

**No._____**

---

ELSALTO REAL ESTATE, INC., a Florida corporation,

Petitioner,

vs.

THE CITY OF MIAMI BEACH, a municipal corporation created and organized under the laws of the State of Florida,

Respondent.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I

### PRELIMINARY STATEMENT

The opinion and orders below, the statement of the matter involved, jurisdictional statements, the questions presented, and the reasons relied on for allowance of the

writ, appear in the petition for a writ of certiorari herein, and in the interest of brevity are incorporated here by this reference.

## II

## SUMMARY OF ARGUMENT

Point 1. The verified bill of complaint as amended alleged: That Elsalto Real Estate, Inc.'s land was zoned by the city of Miami Beach in 1930 for R-AA estate district use and which required a lot area of 40,000 square feet for each family (r. 4-5); that, on account of enumerated changes in the character of the neighborhood, increased traffic, very recent rezoning of seven lots of land containing 8.13 acres, situate within 750 feet of Elsalto's land in the same tier of ocean front lots, for RE multiple family district use pursuant to a decree of said circuit court which had been affirmed by the Supreme Court of Florida, etc., Elsalto's land, which had a large dwelling house thereon, was no longer suitable for R-AA estate district use (r. 6-7, and 8-9); that Elsalto's improved land was in great demand for said RE multiple family district use, to wit, apartment house and hotel use (r. 8-9); that, on account of the aforesaid changes, the zoning of Elsalto's land for R-AA estate district use was not then predicated on or related to public safety, public health, public morals or general welfare and was no longer of aid or benefit to any general plan for the development of the city of Miami Beach (r. 8-9); and that the rezoning of Elsalto's land so as to permit it to be used for said RE multiple family district use, apartments and hotels, would not affect the public safety, public health, public morals or general welfare of the city of Miami Beach, and would

increase its value approximately $250,000.00 (r. 9-10). The trial court overruled the motion of the city of Miami Beach to dismiss said complaint as amended (r. 25-26). The Supreme Court of Florida, in effect, sustained said motion of the city to dismiss said complaint as amended (r. 37-41) on the ground, in effect, that the "fairly debatable" rule announced by the Supreme Court of the United States in the case of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, prevented the state court from entertaining the suit and determining if the pleaded facts were true and established that such zoning of complainant's land amounted to the taking of complainant's property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, because the entertaining of the suit and the weighing of the pleaded facts would amount to the state court substituting its judgment for that of the legislative city council.

Point 2. The refusal of the Supreme Court of Florida to recognize that such a verified bill of complaint as amended set forth a claim upon which relief could be granted, and to sustain the judgment of the trial court, was arbitrary and capricious.

Point 3. Said verified bill of complaint as amended **also averred:** That, shortly prior to the institution of said rezoning suit, the city of Miami Beach had instituted a statutory condemnation proceeding against Elsalto Real Estate, Inc. and two other persons, wherein said city contended that it was seeking to acquire the fee simple title to the 400 feet of ocean front land of said property owners for alleged "park purposes"; that the real purpose of that condemnation proceeding was to acquire said land

for housing and entertaining public officials from other countries, states and cities, and to create a "buffer zone" to prevent other owners of land in the same narrow tier of ocean front lots from attempting to rezone their lots (r. 12-13); and prayed for an order staying said condemnation proceeding against Elsalto's land until the equities of said rezoning case could be determined and Elsalto's land could be rezoned for its best and most valuable use (r. 15). The rezoning suit and the condemnation proceeding were in the same circuit court (r. 12). Elsalto, on the hearing of its motion to stay the condemnation proceeding, proved the aforesaid allegations of its verified bill of complaint by a certified copy of the minutes of the city council at which the resolution authorizing said condemnation proceeding had been adopted (r. 27-28), and also by the written depositions of four of the city councilmen (r. 28-36). The city filed no answer to the verified bill of complaint, and introduced no evidence. The trial court consequently entered an order temporarily staying said condemnation proceeding in that court with respect to Elsalto's land until the rezoning suit in that court with respect to Elsalto's land was determined (r. 24-25). The Supreme Court quashed that order (r. 37), apparently on the ground that Elsalto had sat idly by and took no action until after the institution of the condemnation proceeding against its land and then only for the purpose of compelling the city in the condemnation proceeding to pay the increased value brought about by rezoning (r. 40). Elsalto, in its petition for rehearing, contended that that part of the opinion and order of the Supreme Court of Florida was arbitrary and capricious and amounted to the taking of Elsalto's land without due process of law (r. 46-47).

## III

## ARGUMENT

### POINT 1

*The decision of the Supreme Court of Florida in this case is in conflict with the decision of the Supreme Court of the United States in the case of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, and with federal court decisions adhering to the tests laid down in that case.*

In Euclid v. Ambler Realty Co., supra, the Supreme Court of the United States measured the power of all courts, both state and federal, of the United States of America. It there held that, in a case where the complainant is attacking a comprehensive zoning ordinance as an entirety on the ground that the ordinance by its mere existence operates to greatly reduce the value of complainant's land, the legislative judgment must be allowed to control, if the validity of the legislative classification for zoning purposes is fairly debatable. In that case the Supreme Court of the United States also recognized that, in a case where a complainant is attacking the validity of specified provisions of such a zoning ordinance as applied to and enforced against complainant's land, the facts with respect thereto might establish that such enforcement of such provisions of the ordinance was clearly arbitrary and unreasonable, and might consequently amount to the taking of complainant's land without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

In the subsequent case of Zahn v. Board of Public Works of City of Los Angeles, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074, which was a mandamus proceeding brought in the state court to compel a board to issue a building permit to the property owner to erect a business building upon a lot lying in an area zoned for residential property, the Supreme Court of the United States affirmed its aforesaid decision in said case of Euclid v. Ambler Realty Co.

In the subsequent case of Nectow v. City of Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842, the Supreme Court of the United States reaffirmed its aforesaid "fairly debatable" rule laid down in Euclid v. Ambler Realty Co., but specifically stated that "governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited," and that "such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare." In said Nectow case, the trial court determined that the placing of the land involved in that case in a residential area "would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant city," and would cause a material loss to the property owner. In said Nectow case, the Supreme Court of the United States held that, in view of such findings of facts of the state court, "the necessary basis for the support of that invasion is wanting", and that consequently "the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained."

In said Nectow case, the Supreme Court of the United

States certainly did **not** hold that the "fairly debatable" rule means that the legislative intent should be sustained by the courts even though the facts show that the zoning ordinance, as applied in certain particulars to the locus in quo, is arbitrary and unreasonable and bears no substantial relation to the public health, safety, morals or general welfare.

In the case under consideration the verified bill of complaint of Elsalto Real Estate, Inc. as amended **averred**:

> That Elsalto Real Estate, Inc.'s land was zoned by the city of Miami Beach in 1930 for R-AA estate district use, which required a lot area of 40,000 square feet for each family (r. 4-5); that, on account of enumerated changes in the character of the neighborhood, increased traffic, very recent rezoning of seven lots of land (containing 8.13 acres), situate within 750 feet of Elsalto's land and in the same narrow tier of ocean front lots, for RE multiple family district use, apartment houses and hotels, pursuant to a decree of said circuit court which had been affirmed by the Supreme Court of Florida, etc. (r. 6-8), Elsalto's land, which had a large dwelling house thereon (r. 4), was no longer suitable for R-AA estate district use (r. 8-9); that Elsalto's improved land was in great demand for said RE multiple family district use, to wit, apartment house and hotel use (r. 9); that, on account of the aforesaid changes, the zoning of Elsalto's land for R-AA estate district use was not then predicated on or related to public safety, public health, public morals or general welfare, and was no longer of any aid or benefit to any general plan for the

development of the city of Miami Beach (r. 9); and that the rezoning of Elsalto's land so as to permit it to be used for said RE multiple family district use, apartments and hotels, would not affect the public safety, health, morals or general welfare of the city of Miami Beach, and would increase its value approximately $250,000.00 (r. 9-10).

The state trial court overruled the city's motion to dismiss said complaint as amended (r. 25-26), because it correctly interpreted and applied the "fairly debatable" rule as defined by the Supreme Court of the United States in said case of Euclid v. Ambler Realty Co. and in said case of Nectow v. City of Cambridge. The Supreme Court of Florida reversed the state circuit court and quashed said order sustaining the bill of complaint as amended (r. 37 and 48-49), because it misconstrued and misinterpreted said "fairly debatable" rule. The Supreme Court of Florida, in effect, held that the legislative intent should be sustained even though the facts as pleaded showed that the zoning ordinance restricting the use of Elsalto's land to R-AA estate district use etc. was arbitrary and unreasonable and bore no substantial relation to the public health, safety, morals or general welfare and was no longer of any aid or benefit to any general plan for the development of the city of Miami Beach, and even though the facts as pleaded showed that such restrictive ordinance had damaged Elsalto in the sum of at least $250,000.00, and even though the facts as pleaded showed that the rezoning of Elsalto's land for RE multiple family use, apartment and hotel use, would not affect the public health, safety, morals or general welfare of the city.

That decision of the Supreme Court of Florida erroneously misconstrued the "fairly debatable" rule as defined by the Supreme Court of the United States, and resulted in depriving Elsalto Real Estate, Inc. of its property without due process of law contrary to the provisions of Section 1 of Article XIV (Amended) of the Constitution of the United States. The Supreme Court of Florida, by its challenge of the decision in the Euclid v. Ambler Realty Co. case and the decision in the Nectow v. City of Cambridge case, has raised an important question in the application of the law of zoning that should be decided by the Supreme Court of the United States.

## II

## POINT 2

*The action of the Supreme Court of Florida was arbitrary and capricious and should be reviewed by the Supreme Court of the United States.*

As heretofore pointed out, Elsalto Real Estate, Inc.'s verified bill of complaint as amended averred facts which clearly showed that those portions of the 1930 zoning law which required Elsalto's land to be used for said R-AA estate district use and required a lot area of at least 40,000 square feet for each family were arbitrary and unreasonable and bore no substantial relation to the public health, safety, morals or general welfare and damaged Elsalto in the sum of at least $250,000.00, and that the continuance of said land in said R-AA estate district use was not of any aid or benefit to any general plan for the development of the city of Miami Beach (r. 6-10). The trial court held that said bill of complaint as amended

stated a case upon which relief might be granted, and overruled the city's motion to dismiss the complaint as amended (r. 25-26). The Supreme Court of Florida overruled the trial court and sustained said motion to dismiss the complaint as amended (r. 37 and 48-49). In its opinion, the Supreme Court of Florida so misconstrued the "fairly debatable" rule set forth in said case of Euclid v. Ambler Realty Co., and in said case of Nectow v. City of Cambridge, as to make it mean that the courts should not entertain a rezoning suit even though the pleaded facts therein show that the action of the zoning authority complained of is within the ban of the Fourteenth Amendment of the Constitution of the United States. That opinion of the Supreme Court of Florida also indicated that the majority of the members of that court were unduly anxious to prevent that court from becoming "the zoning boards for every county and municipality in the State" of Florida, because they said:

> "If the Courts adopt the policy of substituting their judgments for that of city officials, simply because of their refusal to rezone the property in accordance with the wishes of the landowner to increase the value of the land, they will eventually become the zoning boards for every county and municipality in the State." (r. 41).

We respectfully submit that such action of the Supreme Court of Florida is arbitrary and capricious.

## III

## POINT 3

***The decision of the Supreme Court of Florida that Elsalto Real Estate, Inc. sat idly by and took no***

*action until after the institution of the condemnation proceeding against its land and then only for the purpose of compelling the city, in the condemnation proceeding, to pay the increased value brought about by rezoning, was arbitrary and capricious and should be reviewed by the Supreme Court of the United States.*

Said condemnation or eminent domain proceeding was commenced in said circuit court on April 4, 1952 (r. 1). Said rezoning suit of Elsalto Real Estate, Inc. was commenced in said circuit court on June 2, 1952 (r. 3).

As heretofore pointed out, the verified bill of complaint as amended of Elsalto Real Estate, Inc. **also averred:** That on account of the rezoning (pursuant to a decree of said circuit court, which was recently affirmed by the Supreme Court of Florida (r. 7-8), of the seven Firestone lots (8.13 acres), which were 750 feet south of Elsalto's land and in the same narrow tier of ocean front lots, so they could be used for apartment house and hotel use (r. 7-8), and on account of the commencement on April 25, 1952 of the Kay and Haas rezoning suit in said circuit court on their five lots (500 feet on the ocean) which were situate 250 feet south of Elsalto's land and in the same narrow tier of ocean front lots, and on account of the commencement on or about April 25, 1952 of the H. Gertrude Hogan rezoning suit in said circuit court on her lot of land which was 150 feet south of Elsalto's land and in the same tier of ocean front lots (r. 10-11), and on account of the changes in the character of the immediate neighborhood, and increased traffic, etc. (r. 6-8), those provisions of the zoning ordinance adopted by the city of Miami Beach on December 3, 1930 which restricted El-

salto's land to R-AA estate district use and required a lot area of not less than 40,000 square feet for each family, were arbitrary and unreasonable and bore no substantial relation to the public safety, health, morals or general welfare, and the continuance thereof was no aid or benefit to any general plan for the development of the city of Miami Beach and injured and damaged Elsalto in the sum of at least $250,000.00 (r. 8-10); that, shortly prior to the commencement of said Elsalto rezoning suit, said city had instituted in said circuit court a statutory condemnation proceeding against Elsalto's land and the adjoining property of two other persons, wherein the city alleged that it was seeking to acquire the fee simple title to the 400 feet of ocean front land of said property owners for alleged "park purposes" (r. 12-13); that the real purpose of that condemnation proceeding was to acquire said land for housing and entertaining visiting dignitaries, public officials and important people from other countries, states and cities, and to create a "buffer zone" to prevent other owners of land in the same narrow tier of ocean front lots from attempting to rezone their lots (r. 12-13); and also prayed for an order staying said condemnation proceeding against Elsalto's land until the equities of said rezoning suit instituted by Elsalto could be determined and Elsalto's land could be rezoned for its best and most valuable use (r. 15). Elsalto, on the hearing of its motion to stay the condemnation proceeding, proved the last aforesaid allegations with respect to the real purpose of said condemnation proceeding, by a certified copy of the minutes of the city council at which the resolution authorizing said condemnation proceeding had been adopted and by the written depositions of four of the city councilmen (r. 27-28 and 28-36). Said city filed no answer to the verified bill of complaint, and introduced no evidence at

that hearing. The trial court consequently entered an order temporarily staying said condemnation proceeding in that court with respect to Elsalto's land until the rezoning suit in that court with respect to Elsalto's land was determined (r. 24-25). One of the apparent reasons for that stay order was to enable Elsalto to rezone its land for its best and most valuable use, to wit, RE multiple family district use, apartment houses and hotels, so that it could unquestionably obtain in said eminent domain proceedings its "full" and "just" compensation therefor as provided for by Section 29 of Article XVI of the Florida Constitution which reads as follows,

> "No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

and by Section 12 of Declaration of Rights of the Florida Constitution which reads as follows:

> "No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation."

If the property owner is first entitled to "full compensation", "just compensation", for his land, before it can be taken in an eminent domain proceeding, why is he **not** entitled to the remedy of a rezoning suit in equity to remove the confiscatory zoning ordinance (adopted by the condemnor twenty-two years prior to the commencement of the rezoning suit and the condemnation proceeding) which might assist the condemnor to get the land for one-fourth of its "full" value?

The Supreme Court of Florida failed to take into consideration: That the mere adoption of a resolution of the city to take for alleged park purposes, and the unannounced filing in court, on the day of the adoption of the resolution, of the eminent domain proceeding, **does not** amount to the taking of any of the property owner's rights; and that, before any of the property owner's rights are affected, there must be a trial by a jury, a verdict of a jury, a final judgment on that verdict and the payment into court of the full compensation pursuant to the provisions of Section 73.13 Florida Statutes 1951 which reads as follows:

> "The petitioner, within ten days after the rendition of the judgment, shall pay into the court for the use of the defendant the compensation ascertained by the jury, or else the proceedings shall be null and void, unless, for good cause, further time, not exceeding thirty days, be allowed by the court. Upon such payment, and upon the recording of the judgment, with the clerk's certificate that the compensation has been paid into the court, in the book of deeds in said clerk's office, the petitioner may enter upon and appro-

priate the property for the uses aforesaid, with the same effect as though the petitioner held the same by deed or grant from the defendant."

The right of the owner to petition the court for rezoning is a valuable property right. That valuable property right should not be cut off merely because the municipality, on account of a quick resolution authorizing the taking and an immediate condemnation proceeding, got to the court house first. We respectfully submit that the decision of the Supreme Court of Florida to the effect that the right of Elsalto Real Estate, Inc. to have its land rezoned for its best and most valuable use was cut off by the mere institution of the eminent domain proceeding, was arbitrary and capricious.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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## No. 137

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ELSALTO REAL ESTATE, INC., a Florida corporation,

Petitioner,

-vs-

THE CITY OF MIAMI BEACH, a municipal corporation created and organized under the laws of the State of Florida,

Respondent.

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## BRIEF OF THE RESPONDENT CITY OF MIAMI BEACH

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### STATEMENT OF THE CASE

We consider the "statement of the matter involved" appearing in the Petition and the "preliminary statement" appearing in Petitioner's Brief to be wholly insufficient and believe that the case may be concisely and properly stated as follows:

The legislature of the State of Florida incorporated the City of Miami Beach on May 25, 1917 by Special Act. (1). The Act granted the City the power of eminent domain. (2).

In the exercise of this power the City, by resolution of its Council, adopted April 4, 1952 (R-1), declared it to be necessary for the City of Miami Beach to acquire for park purposes certain lands situate within the City known as Lots 6, 7, 8 and 9 of Indian Beach Corporation Subdivision and directed the City Attorney to institute condemnation proceedings therefor. (R-1).

Acting accordingly, the City Attorney on April 4, 1952, filed, on the Law side of the Circuit Court of Dade County, Florida, the petition of the City of Miami Beach seeking the condemnation of the described land for park purposes. (R-12).

Thereafter, on June 2, 1952, the petitioner herein, Elsalto Real Estate, Inc., a Florida corporation, the owner of the north 50 feet of Lot 8, and all of Lot 9, above mentioned, filed its Bill of Complaint on the Equity side of the same Court wherein it prayed:

(1) That the zoning ordinance of the City of Miami Beach (adopted December 3, 1930), which restricted petitioner's property to "RAA" (single family estate) Use

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(1) Chapter 7672, Special Acts, 1917, Laws of Florida.

(2) "The City of Miami Beach shall have power:
(a) . . . to acquire property for park purposes . . .
(b) To exercise the right of eminent domain and by virtue thereof to acquire title to or rights of way in property within the territorial limits of said City for any of the foregoing purposes." Chapter 7672, Special Acts, 1917, Laws of Florida, as amended by Chapter 13101, Special Acts 1927, Laws of Florida.

be declared to be invalid and unconstitutional. (2) That the condemnation proceedings be stayed pending the progress of petitioner's suit, and (3) That the respondent, City of Miami Beach, be thereafter permanently restrained from seeking to condemn petitioner's property. (R-15).

Thereafter, on July 24, 1952, the respondent, City of Miami Beach, filed its Motion to Dismiss the Bill of Complaint on various grounds, including the following: 1. That the Bill of Complaint did not state a claim upon which relief could be granted, and 2. That the Bill of Complaint affirmatively showed that it was filed subsequent to the institution of the condemnation proceedings brought by the respondent, City of Miami Beach. (R-23-24).

Thereafter, by Orders dated July 25, 1952 and July 28, 1952, respectively, the Dade County Circuit Court denied the City's Motion to Dismiss and enjoined all further proceedings in the condemnation proceedings pending final determination of the Petitioner's Bill of Complaint. (R-24-25).

Thereafter, the respondent, City of Miami Beach, filed its Petition for Writ of Certiorari to the Supreme Court of Florida wherein it complained that the Order denying its Motion to Dismiss and the Order staying the proceedings in the condemnation suit were erroneous and assigned various reasons therefor, including the assertion that the Bill of Complaint would not lie because an owner cannot, subsequent to the institution of condemnation proceedings by a Governmental unit, maintain such a suit where, for the first time, complaint is made of zoning restrictions. (R-1-2.

Thereafter, on January 27, 1953, the Supreme Court of Florida granted Certiorari; reviewed the record; rendered its Opinion and Judgment (R-38-41 inclusive); denied petitioner's Petition for Rehearing (R-48); and issued its mandate to the Dade County Circuit Court, directing that the Orders denying the City's Motion to Dismiss and granting the Stay Order be vacated and set aside. (R-48-49).

## ARGUMENT

The petitioner does not contend that the City of Miami Beach lacks the power of eminent domain.

Its Bill of Complaint asserts however, that it is entitled to enjoin the prosecution of the condemnation proceedings instituted by the City because its property is not properly zoned.

The Supreme Court of Florida has held that Petitioner's complaint about the zoning of its property after the City had commenced condemnation proceedings came too late, and that the City could not be enjoined from continuing the condemnation proceedings merely to afford the petitioner an opportunity to litigate the reasonableness of the zoning restrictions applicable to its property.

This determination by the Florida Supreme Court, it contends, denies it the equal protection of the law, and deprives it of property without due process in violation of the 14th Amendment.

This contention is not sustained by the record.

The record shows that the City adopted its comprehensive zoning ordinance in December, 1930.

Under its provisions the petitioner's property has always been and is now restricted to single family estate use.

The petitioner has maintained improvements upon this property described in its Bill as "an elaborate and expensive estate type dwelling containing about fourteen rooms and servants quarters; many trees and shrubs; and other improvements." (R-4).

This Zoning Ordinance provides two separate remedies for persons deeming themselves aggrieved by the application of the Ordinance to their property, namely, by application to the City Council for a change of zoning, or by application to the Zoning Board of Adjustment for a variance from the strict letter of the Ordinance.

The petitioner at no time found any fault with the zoning applicable to its property prior to the institution of condemnation proceedings by the City on April 4, 1952.

The first complaint it made was on June 2, 1952, when it filed its Bill of Complaint in the Dade County Circuit Court. It was not until July 23, 1952, after the City had moved to dismiss the Bill, that the petitioner applied to the City Council for a change of zoning. Petitioner has yet to make any application to the Zoning Board of Adjustment for the grant of a variance. It is obvious, therefore, that the petitioner has at all times enjoyed the use of its property under the applicable zoning and has at no time evinced the slightest desire or intent to use its prop-

erty for hotels or apartments as would be permitted under the more liberal "R E Multiple Family" classification now sought by it.

The sole purpose of its suit is to make the most it can from the taking of its property for it asserts in its Bill that its "property, if rezoned . . . would be readily salable . . . at a sale price of from two to three times more . . ." (R-9).

However, there is no allegation, or any complaint made that the laws of Florida do not afford the petitioner every opportunity to be heard judicially on the amount of compensation to which it will be entitled. **(Georgia v. Chattanooga, 264 U.S. 472, 44 S. Ct. 360).**

It is settled by this Court that the final judgment of a State Court "ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless by the rulings upon questions of law the (petitioner is) prevented from obtaining substantially any compensation."

**Chicago, B. & Q. Rwy. v. Chicago, 166 U.S. 226, 17 S. Ct. 581,**

**McGovern v. New York, 229 U.S. 363, 33 S. Ct. 876.**

The Supreme Court of Florida having determined that the complaint of improper zoning came too late, this left only the allegations of bad faith and lack of necessity to serve as a basis for enjoining the condemnation suit, and the State Court has expressly pointed out that the petitioner may litigate these issues in the condemnation suit.

This determination by the Supreme Court of Florida follows the rule of this Court, that equity will not enjoin condemnation proceedings where the plaintiff has an adequate remedy at law, (**Osborne v. Missouri Pacific Railway Co.**, 147 U.S. 248, 13 S. Ct. 299).

At all events, the decision of the highest Court in Florida on that question must be followed by this Court, **Southern Railway Co. v. City of Durham**, 266 U.S. 178, 45 S. Ct, 51; and consequently the judgment below may be deemed to rest upon an adequate and sufficient non-federal ground, **Vandalia Railroad Co. v. Indiana**, 207 U.S. 359, 28 S. Ct, 130; **Herb v. Pitcairn**, 324 U.S. 117, 65 S. Ct. 459.

In view of the determination by the Florida Supreme Court that the petitioner was not entitled to an injunction, it is unnecessary to determine the sufficiency of that phase of the Bill which attacks the validity of the Zoning Ordinance as it applies to Petitioner's property. At all events, it was for the State Court to say whether this phase of the Bill was sufficient, under the rules of pleading obtaining in Florida. (**Washington v. Miller**, 235 U.S. 422, 35 S. Ct. 119; **United States v. Pink**, 315 U.S. 203, 62 S. Ct. 552).

In conclusion, if by any chance the State Courts should, in the trial of the condemnation proceedings, deny the petitioner a federal right, the appropriate and adequate remedy by review in this Court is obviously available. **(Cavanagh v. Looney**, 248 U.S. 453, 39 S. Ct. 142).

Respectfully submitted,

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